Supreme Court, U.S.
FILED

97 2060 JUN 22 1998

OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1998

Eugene H. Gaddis, Petitioner

v.

Sharon H. Gaddis, Respondent

On Petition for a Writ of Certiorari to the
State of Arizona Court of Appeals,
Division Two

PETITION FOR A WRIT OF CERTIORARI

Eugene H. Gaddis
Pro Se

7361 E. Victoria Dr.
Tucson, AZ 85730
(520) 745-9475

52 pp

Whether the State of Arizona Courts can deny the statutory deduction of the Dual Compensation Offset (5 U.S.C. §5532) which is set forth in the Uniformed Services Former Spouses' Protection Act (10 U.S.C. §1408) as a deduction to my monthly retired pay to establish disposable retired pay (community property) because the waiver for the Dual Compensation Offset began after the final decree of dissolution had been entered.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

Eugene H. Gaddis, Petitioner

v.

Sharon H. Gaddis, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF ARIZONA COURT OF APPEALS, DIVISION TWO

I, Eugene H. Gaddis, respectfully petition for a writ of certiorari to review the judgment of the State of Arizona Court of Appeals, Division Two, in this case.

OPINIONS BELOW

The opinion of the court of appeals is at Appendix B, pages 1 - 17. The trial court orders are at Appendix A, pages 1 - 11.

JURISDICTION

The Arizona Superior Court, Pima County, last denied the motion to amend judgement on September 24, 1996. The Arizona Court of Appeals, Division Two, affirmed the trial

court's orders (App A) on appeal in its opinion (App B) on August 14, 1997 and denied the Motion for Reconsideration on September 10, 1997. The Supreme Court of Arizona denied the Petition for Review on May 21, 1998. (App C) The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (a).

STATUTORY PROVISION INVOLVED

Title 10 U.S.C. §1408(a)(4) provides, in part, that "the term disposable retired pay means the total monthly retired pay to which a member is entitled less amounts which -- (B) are deducted from the retired pay...as a result of a waiver of retired pay required by law in order to receive compensation under title 5...;" Further, it authorizes state courts to "treat disposable retired pay" as community property divisible in a divorce proceeding (§1408(c)) with the limitation "(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not

exceed 50 percent of such disposable retired pay." §1408(e)(1).

STATEMENT

1. I, Eugene H. Gaddis, as Respondent, and Sharon H. Gaddis, as Petitioner, were divorced by a Decree of Dissolution of Marriage entered at a default hearing on April 8, 1993, by Judge L. B. Sammons, Pima County Superior Court.

2. The trial court awarded Respondent "FIFTY PERCENT (50%) of participant's disposable military retirement pay as calculated by the United States Joint Military Service Finance Center" which is set forth in its Qualified Domestic Relations Order. (See App B, p 3).

3. Respondent, Sharon H. Gaddis, filed a Petition Order to Show Cause Re Contempt on February 2, 1996 after I, Eugene H. Gaddis, Petitioner, became employed by the Federal Government in a civil service position. The Arizona trial court held that, "The value of

the retirement plan...unaffected by any additions, subtractions or modifications subsequent to dissolution." and ordered "...paid $750...Any portion not paid by the Department of Defense shall be paid by Respondent." (App A, pp 1-2). These appeals followed.

4. Title 10 U.S.C. §1408, the Uniformed Services Former Spouses' Protection Act is the relevant statutory law for this matter.

5. Mansell v. Mansell, 490 U.S. 581 (1989); Moon v. Moon, 795 S.W.2d 511 (Mo. App. 1990); and Knoop v. Knoop, 542 N.W.2d 114 (N.D. 1996) are relevant decisional laws for this matter.

6. Pursuant to the Supremacy Clause, federal law preempts and takes precedence over state law by prohibiting states from establishing decisional or statutory law that is inconsistent with federal law.

REASONS FOR GRANTING THE PETITION

The state of Arizona courts have exceeded the authority and jurisdiction granted to them by 10 U.S.C. §1408, the Uniformed Services Former Spouses' Protection Act, the Act, by denying the statutory deduction of the Dual Compensation Offset in establishing my disposable retired pay (community property). They have subsequently altered the final decree by awarding personal property not subject to division as community property by ordering me to pay to the Respondent in excess of 50% of my disposable retired pay as calculated by the Defense Finance Center.

1. The Act authorized state courts to treat disposable retired pay as community property (§1408 (c)), defines disposable retired pay (§1408(a)(4)), and sets the limitation of 50% of disposable retired pay payable pursuant to subsection (c) (§1408(e)). The Arizona Courts' interpretation of the Act is that the total monthly retired pay is not

required by federal law to be affected "by any additions, subtractions or modifications subsequent to dissolution." (App A, p 1). That would negate all deductions to establish disposable retired pay for all veterans who were/are divorced prior to their retirement or any deduction that begins after the final decree was entered since all the deductions set forth in the Act occur post-retirement. That would preclude veterans receiving disability benefits due to long term effects of a disability; ie, exposure to Agent Orange or Nerve Gas. The plain and precise language of the Act simply does not state nor imply any qualification or limitation regarding when any deduction begins that would disallow it if that occurred post-decree. The Act also does not authorize state courts to set an arbitrary value for disposable retired pay nor to award in excess of 50% of disposable retired pay as community property.

2. This Court's ruling on Mansell v. Mansell, 490 U.S. 581 (1989) upheld the Act by stating that "disposable retired or retainer pay" is defined as "the total monthly retired or retainer pay to which a military member is entitled, minus certain deductions." (Mansell, supra at 585). The Mansell ruling is used as the defining case law by other states' courts when ruling on cases analogous to this case where a waiver of retirement pay for the dual compensation offset that began after the final decree had been entered was used to establish disposable retired pay for division as community property. The Missouri Court of Appeals in Moon v. Moon, 795 S.W.2d 511 (Mo. App. 1990), and the Supreme Court of North Dakota in Knoop v. Knoop, 542 N.W.2d 114 (N.D. 1996), both held that the deduction for the dual compensation offset, which began post-decree in both, was properly applied to establish disposable retired pay which is the marital divisible property. In this case,

the original trial court divided my disposable retired pay 50%/50% and, thus, it is that 50% of disposable retired pay as continually calculated by the Defense Finance Center that was awarded and became vested; not $1,500.00 per month.

3. The lower Courts' rulings were rendered with bias and prejudice as indicated in their statements, "...seeking and securing Federation employment" (App A, pp 7-8), "... circumstances unilaterally imposed by husband." (App B, p 10), "Husband deliberatly frustrated the decree by voluntarily waiving retirement benefits..." (App B, p 13), and "...unilaterally obtaining civil service employment post-decree." (App B, p 13). That is not the reason for becoming employed after applying for other non-government and government positions. I already have limited employment opportunities besides this financial penalty for civil service employment. I am a disabled veteran having been retired

Honorably in a Permanent Disability Retirement status. Choice of employment is my right. The state of Arizona courts are penalizing me for that choice by alleging a unilateral action when a federal government agency, the Defense Finance Center, is applying a federal law, the Act, to the circumstances as ordered in the Arizona trial court's Qualified Domestic Relations Order. They are paying 50% of my disposable retired pay as the former spouse payment.

The lower courts' rulings contain misstatements of statutory and decisional law. The case histories cited and relied on are not relevant since none deal with the question of a deduction that began after the final decree had been entered. The Crawford and Strassner cases, in particular, are used out of context. Crawford deals with a lump sum payment, not military retirement pay, which was marital property; not disposable retired pay of a retiree established by

applying the deductions to the total monthly retirement benefit. Strassner deals with a pre-decree settlement and a court order contained in the final decree.

4. Other state courts, as previously cited, and the Defense Finance and Accounting Service, Cleveland Center, consider the deduction for the dual compensation offset to be valid if it begins after the final decree has been entered; contrary to the Arizona courts' rulings. In this case, the Defense Finance Center is clearly aware from the trial court's documents that my civil service employment began after the final decree had been entered. They have stated that they are correctly and continually calculating my disposable retired pay according to the Act and that they are continuing to pay 50% as the former spouse payment as ordered in the trial court's Qualified Domestic Relations Order.

5. The question presented is important to me as well as many other veterans. State

courts allowed to selectively deny statutory deductions to total monthly retired pay which establishes disposable retired pay, to arbitrarily set a value to be used as disposable retired pay, or to incorrectly award in excess of 50% of disposable retired pay as community property put many veterans' benefits at risk.

6. The state of Arizona courts' rulings are clearly in violation of the Supremacy Clause of the Constitution of the United States of America.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE H. GADDIS
Pro Se

7361 E. Victoria Dr.
Tucson, AZ 85730
(520) 745-9475

APPENDIX A

FILED
Apr 24, 96

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. RICHARD NICHOLS

CASE NO. D-93699

COURT REPORTER: NONE

DATE: Apr 24, 96

IN RE THE MARRIAGE OF:

SHARON H. GADDIS
Petitioner

and

EUGENE H. GADDIS
Respondent

MINUTE ENTRY

UNDER ADVISEMENT RULING:

The Court having reviewed the memoranda submitted by both parties, evidence and argument from the hearing on April 9, 196,

THE COURT FINDS that Petitioner is entitled to one-half (½) interest in Respondent's retirement plan. The value of the retirement plan must reflect only the plan itself, unaffected by any additions, subtractions or modifications subsequent to dissolution.

THE COURT FINDS that the original, actual value of the retirement plan, to which

Petitioner is entitled to one-half (½) is $1,500.00 per month.

THE COURT FINDS that the value of this plan to Petitioner is not reduced by virtue of Respondent's obtaining government employment and implication of the dual compensation offset.

IT IS THEREFORE ORDERED that the Petitioner be paid $750 per month as and for her property interest in the Respondent's pension plan. Any portion not paid by the Department of Defense shall be paid by Respondent.

-signed-
HON. RICHARD NICHOLS

cc: Hon. Richard Nichols
Domestic Calendaring
Clerk of Court-Under Advisement Clerk
Eugene H. Gaddis-7361 E. Victoria Dr. T/A 85730
Deborah Ward, Esq.

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. RICHARD NICHOLS

CASE NO. D-93699

COURT REPORTER: NONE

DATE: Jun 10, 96

IN RE THE MARRIAGE OF:

SHARON H. GADDIS
Petitioner

and

EUGENE H. GADDIS
Respondent

MINUTE ENTRY

RESPONDENT'S MOTION FOR NEW TRIAL OR AMEND JUDGEMENT:

Both parties present.

On Respondent's motion,

Counsel argue to the Court.

Ms. Ward moves for attorney's fees and cost plus the arrearages owed by the Respondent to Petitioner.

IT IS ORDERED the Respondent's motion is denied.

Ms. Ward is directed to file an affidavit for fees and costs and to prepare an Order for arrearages.

Pat Dini
Deputy Clerk

FILED
Jun 26, 96

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. RICHARD NICHOLS

CASE NO. D-93699

COURT REPORTER: NONE

DATE: Jun 26, 96

IN RE THE MARRIAGE OF:

SHARON H. GADDIS
Petitioner

and

EUGENE H. GADDIS
Respondent

MINUTE ENTRY

RE: ATTORNEY'S FEES AND PETITIONER'S INTEREST IN THE RETIREMENT PLAN:

Pursuant to the minute entry dated June 10, 1996,

IT IS ORDERED AS FOLLOWS:

1. The minute entry/order previously entered on April 24, 1996, is hereby confirmed ordering that Respondent pay to Petitioner the sum of $750.00 per month as and for her property interest in the retirement plan. Any portion not paid by the Department of Defense shall be paid by the Respondent.

2. The Respondent has not paid to Petitioner the amount entitled to her since October, 1995, and the amount due and owing to Petitioner from the Respondent through the month of June, 1996, is the total amount of $3,682.35 to be paid to Petitioner on or before October 5, 1996.

3. Respondent shall pay to Petitioner her attorney's fees and costs in the amount of $420.00 consistent with the Affidavit of Attorney's Fees and Costs filed herein by counsel for Petitioner to be paid by October 5, 1996, the Court awarding fees pursuant to the Motion for Rehearing only.

4. Respondent shall pay to Petitioner any portion not paid by the Department of Defense on a monthly basis understanding that since October, 1995, the Department of Defense has paid directly to Petitioner the total amount of $340.83. The total amount due and owing Petitioner is $750.00 leaving a balance of $409.17 to be paid by the

Respondent on or before July 5, 1996, or by the 5th of the month subsequent to the month the obligation is due to be paid.

5. In the event Respondent appeals this ruling, he shall still be under an obligation to pay this amount on a monthly basis until such time, if any, the Court of Appeals changes this Court's ruling.

-signed-
HON. RICHARD NICHOLS

cc: Hon. Richard Nichols
Domestic Calendaring
Deborah Ward, Esq.
Eugene Gaddis-7361 E. Victoria Dr., T/A 85730

FILED
Sep 24, 96

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. RICHARD NICHOLS

CASE NO. D-93699

COURT REPORTER: NONE

DATE: Sep 24, 96

IN RE THE MARRIAGE OF:

SHARON H. GADDIS
Petitioner

and

EUGENE H. GADDIS
Respondent

MINUTE ENTRY

RE: RETIREMENT BENEFITS:

THE COURT FINDS that a complete evaluation and distribution of the parties' assets, liabilities, property and obligations was effectuated by the Decree of Dissolution. That distribution was based on a calculation of Petitioner's community property interest in Respondent's military pension at the time of the Decree. The Court has found his disposable income from the pension to be $1,500.00 per month before the "dual compensation offset" was implicated.

The Court holds that Respondent's seeking

and securing Federation employment alters the calculation of disposable income, but does not alter the value of Petitioner's community property interest in the retirement plan at the time of the Decree, when it was distributed by the Court and it vested in her.

IT IS ORDERED the motion to amend judgment is denied, and Respondent is required to pay Petitioner the amount equal to $750.00 less the Federation government's direct payment to Petitioner.

-signed-
HON. RICHARD NICHOLS

cc: Hon. Richard Nichols
Domestic Calendaring
Deborah Ward, Esq.
William Lane, Esq.

FILED
Nov 12, 96

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. RICHARD NICHOLS

CASE NO. D-93699

COURT REPORTER: NONE

DATE: Nov 12, 96

IN RE THE MARRIAGE OF:

SHARON H. GADDIS
Petitioner

Deborah Ward
Petitioner's Attorney

and

EUGENE H. GADDIS
Respondent

In Proper Person
Respondent's Attorney

MINUTE ENTRY

PETITIONER'S PETITION RE CONTEMPT:

Both parties present.

The Court questions the Respondent regarding Mr. Lane's motion to withdraw and the signing by the Respondent. The Respondent states that he is now representing himself.

Ms. Ward makes statements to the Court regarding the arrearages owed by the Respondent and his failure to pay the obligations as ordered and further requests that the Petitioner be awarded prospective attorney's fees.

Mr. Gaddis makes statements to the Court.

Petitioner's Exhibit 1, being copy of an

accounting of monies owing, is identified.

Petitioner's Exhibit 2, being copy of check stub, is identified.

Ms. Ward withdraws her request for prospective attorney's fees.

IT IS ORDERED entering a Superseding Judgement in the amount of $4,932.68 for arrearages against the Respondent and in favor of the Petitioner; said to be paid at the rate of $500.00 a month until the arrearages are satisfied.

IT IS FURTHER ORDERED that attorney's fees and costs in the amount of $1,625.00 be paid at the rate of $200.00 per month until satisfied.

IT IS FURTHER ORDERED that these amounts are in addition to the amounts previously ordered.

IT IS FURTHER ORDERED that the first payment of $500.00 and $200.00 are due 30 days from this date and thereafter on the 12th day of every month; said payments to

are to be paid directly to the Petitioner.

-signed-
HON. RICHARD NICHOLS

cc: Hon. Richard Nichols
Domestic Calendaring
Deborah Ward, Esq.
Eugene H. Gaddis-7361 E. Victoria Dr., T/A 85730

APPENDIX B

FILED BY CLERK
AUG 14, 1997

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the marriage of	)	2 CA-CV
	)	96-0315
SHARON H. GADDIS,	)	
	)	Pima County
Petitioner/Appellee,	)	Cause No.
	)	D-093699
v.	)	
	)	O R D E R
EUGENE H. GADDIS,	)	
	)	
Respondent/Appellant.	)	

The above-entitled matter was duly submitted to the Court. The court has this day rendered its OPINION.

ORDERED: The OPINION be filed.

FURTHER ORDERED: A copy to this order together with a copy of the OPINION be sent to each party appearing herein or the attorney for such party and to The Hon. Richard Nichols, Judge.

Dated: August 14, 1997

-signed-
Joyce A. Goldsmith
Clerk of the Court

Copies to:

Eugene H. Gaddis
7361 E. Victoria Drive
Tucson, AZ 85730

Cynthia Anson
14 East 2nd Street
Tucson, AZ 85705

Hon. Richard D. Nichols, Judge
Pima County Superior Court
110 W. Congress
Tucson, AZ 85701

FILED BY CLERK
AUG 14, 1997

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the marriage of	)	2 CA-CV 96-0315
	)	Department B
SHARON H. GADDIS,	)	
	)	
Petitioner/Appellee,	)	
	)	OPINION
and	)	
	)	
EUGENE H. GADDIS,	)	
	)	
Respondent/Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-93699

Honorable Richard Nichols, Judge

AFFIRMED

Cynthia L. Anson — Tucson
Attorney for Petitioner/Appellee

Eugene H. Gaddis — Tucson
In Propria Persona

PELANDER, Presiding Judge.

The issue in this domestic relations case is whether, after a final decree of dissolution has been entered, a retired veteran may reduce his or her former spouse's community property

interest in military retirement pay by obtaining civil service employment. The trial court prohibited such a reduction and thereby preserved the decree's allocation of community property to petitioner Sharon Gaddis (wife). Because we conclude that the trial court's order is consistent with the decree and Arizona law and does not conflict with federal law, we affirm.

BACKGROUND

The parties were divorced in April 1993, after almost twenty-eight years of marriage. Respondent Eugene Gaddis (husband) was a member of the United States Air Force throughout the marriage and had retired in April 1992. The trial court initially entered a dissolution decree under which wife waived any rights to husband's military retirement pay. After an evidentiary hearing on wife's motion to set aside the decree, the trial court entered judgement in November 1994, awarding her "one-half of [husband's] military retirement

benefits as of February 1994." Wife also received the family home, while husband received substantial savings bonds and interests in credit union and individual retirement accounts of approximately equal value. No spousal maintenance was requested or awarded.[1]

Husband appealed, objecting only to the trial court's awarding wife an interest in his military retirement benefits. After this court affirmed, Gaddis v. Gaddis, 2 CA-CV 94-0337 (memorandum decision filed March 31, 1995), the trial court issued a qualified domestic relations order in December 1995, ordering the appropriate agency to pay wife 50% of husband's "disposable military retirement pay as calculated by the United States Joint Military Service Finance Center."

Between March 1994 and June 1995, husband's gross monthly retirement pay ranged between $2,923 and $3,004. After duductions for

---

[1]Husband was ordered to pay child support, but that obligation has since terminated.

veterans' benefits (ranging between $166 and $681) and disability benefits (averaging $964), husband's disposable retirement income ranged from $1,359 to $1,870 per month. Although it is not entirely clear from the record, it appears that husband paid wife her share of his retirement pay directly, with monthly checks ranging from $750 to $785.

In October 1995, husband obtained civil service employment with the federal government. His retiree account statement that month reflected a new $848.22 deduction for the "dual compensation offset" required by 5 U.S.C. §5532(b), which provides:

> A retired officer of a regular component of a uniformed service who holds a [civil service] position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retainer pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retainer pay plus one-half of the remainder, if any.

Section 5532(b) thus reduced husband's disposable retired pay to approximately $680 per month, half of which he paid to wife in November

1995. Wife then filed a petition for order to show cause, claiming that her share of husband's retirement pay should not be reduced by the "dual compensation offset."

After an unreported evidentiary hearing, the trial court ruled in April 1996 that the value of wife's one-half interest in husband's retirement pay was "not reduced by virtue of [husband's] obtaining government employment and implication of the dual compensation offset." The court further ruled that "the original, actual value of the retirement plan, to which [wife] is entitled to one-half...is $1,500.00 per month;" it thus ordered husband to pay wife $750 per month. The court subsequently denied husband's two motions for a new trial, reaffirmed its prior rulings, and held that "[husband's] seeking and securing Federa[l] employment alters the calculation of disposable income, but does not alter the value of [wife's] community property interest in the retirement plan at the time of the Decree,

when it was distributed by the Court and it vested in her." The court again ordered husband to pay wife $750 per month, less any amounts paid directly by the government, plus arrearages totaling $4,932.68, attorney's fees, and costs. This appeal followed.

DISCUSSION

The Uniformed Services Former Spouses' Protection Act (the Act), 10 U.S.C. §1408, authorizes courts in community property states like Arizona to divide "disposable retired pay" as community property in dissolution proceedings. §1408(c). The Act was a "direct response" to the decision in McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69L. Ed. 2d 589 (1981), in which the Supreme Court held that federal law prevented states from dividing military retirement pay as community property. Mansell v. Mansell, 490 U.S. 581, 584, 109 S. Ct. 2023, 2026, 104L. Ed. 2d 675 (1989). See also Edsall v. Superior Court, 143 Ariz.

240, 693 P. 2d 895 (1984). In pertinent part, the Act defines "disposable retired pay" that is subject to division as follows:

> the total monthly retired pay to which a member is entitled less amounts which-
>
> * * *
>
> are deducted from the retired pay of such member as a result of...a waiver of retired pay required by law in order to receive compensation under title 5 or title 38.

10 U.S.C. §1408(a)(4)(B). Section 1408(e) then limits the "total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c)" to "50 per cent of such disposable retired pay."

In Mansell, the Supreme Court held that the Act "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits."[2]

---

[2]A military retiree must waive an amount of his or her retirement pay equal to the amount he or she receives in disability benefits. See Mansell, 490U.S. at 584, 109 S. Ct. at 2026; 38 U.S.C. §5305. As noted earlier, the Dual Compensation Act, 5 U.S.C. §§5531 to 5537, also reduces the retirement pay of an officer who obtains civil service employment with the federal government. 5 U.S.C. §5532(b).

490 U.S. at 594-95, 109 S. Ct. at 2032. The Court noted that the Act's grant of authority to state courts to divide military retirement pay "is both precise and limited" and that the statute expressly excludes amounts waived to receive disability benefits from the definition of "disposable retired pay." Id. at 588, 109 S. Ct. at 2028. According to the Court, the defined term is used "to limit specifically and plainly the extent to which state courts may treat military retirement pay as community property." Id. at 590, 109 S. Ct. at 2029. Moreover, the section of the Act addressed in Mansell, 10 U.S.C. §1408(a)(4)(B), also excludes from the definition of "disposable retired pay" amounts waived to receive civil service compensation under title 5, U.S.C.

Relying on §1408 and Mansell, husband contends that wife's community interest in his retirement benefits must automatically be reduced by the amount he waived in order

to receive civil service compensation, despite the fact that the waiver occurred well after the final dissolution decree was entered. We disagree because Arizona law does not permit, and federal law does not require, such an outcome.

Husband's contention, which essentially calls for a de facto modification of the dissolution decree's community property allocations, is inconsistent with Arizona law. In Arizona, "[a] decree of dissolution of marriage...is final when entered, subject to the right of appeal." A.R.S. §25-325. Provisions in a decree "as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgement under the laws of this state." §25-327(A). As our supreme court has emphasized, "[t]he well-established rule is that property settlements are not subject to modification or termination." DeGryse v. DeGryse, 135 Ariz. 335, 338, 661 P.2d 185,

188 (1983). See also Edsall, 143 Ariz. at 248, 693 P. 2d at 903 ("A property award is essentially permanent.") "The need for finality and stability in marriage and family law is great. Absent express authorization ...or a finding of 'extraordinary circumstances' as contemplated by rule 60(c)(6), a property settlement cannot be disturbed." DeGryse, 135 Ariz. at 338, 661 P. 2d at 188. See also Reed v. Reed, 124 Ariz. 384, 385, 604 P. 2d 648, 649 (App. 1979) ("There is a compelling policy interest favoring the finality of property settlements.")

These principles strongly support the trial court's implicit refusal to essentially modify the decree in this case by reducing wife's community property interest in husband's retirement pay due to a post-decree change in circumstances unilaterally imposed by husband. This court generally has not permitted a former spouse, post-decree, "to transform retirement benefits constituting

community property to [other, non-retirement] benefits constituting separate property." McNeel v. McNeel, 169 Ariz. 213, 215, 818 P. 2d 198, 200 (App. 1991). See also In re Marriage of Crawford, 180 Ariz. 324, 884 P. 2d 210 (App. 1994). In Crawford, a somewhat analogous case, we held that a husband could not divest his former spouse of a community property interest in accrued military retirement benefits by voluntarily relinquishing those benefits post-decree in order to receive a lump sum Special Separation Benefit, stating: "An employee spouse cannot defeat the nonemployee spouse's interest in retirement benefits by invoking a condition wholly within his or her control." Id. at 327, 884 P. 2d at 213.

Neither the Act nor Mansell compels a different conclusion here. Nothing in the Act suggests that a court's final award of a community property interest in retirement pay must be altered when the military retiree obtains civil service employment post-decree.

Although the Act precludes a state court from dividing retirement pay waived pursuant to the dual compensation offset, the trial court did not do so in this case. Rather, the 1994 dissolution decree quantified with certainty wife's community property interest in husband's military retirement benefits by awarding her one-half of those benefits "as of February 1994." See Stine v. Stine, 179 Ariz. 385, 388, 880 P. 2d 142, 145 (App. 1994) (meaning of decree determined from language used and court cannot remake language to alter existing rights or obligations). Compare Gilliland v. Stanley, ___S.E.2d ___, ___, 1997 WL 180587, at *1 (Tenn. App. April 16, 1997) (decree ordered husband to pay 35% "'of his retirement benefits from the military when the same vests as long as [he receives] the same'").

At the time of the decree, there was no dual compensation offset because husband

had not yet obtained civil service employment. When he subsequently did, the decree already had established wife's fixed interest in the military retirement benefits. Husband deliberately frustrated the decree by voluntarily waiving retirement benefits which the court had vested in wife. He could not reduce that vested interest by unilaterally obtaining civil service employment post-decree. Cf. Beltran v. Razo, 163 Ariz. 505, 507, 788 P.2d 1256, 1258 (App. 1990) (ex-wife's interest in former husband's military retirement pay deemed "vested property rights"). As the Missouri court of appeals stated in a similar case:

> In the present case the trial court awarded wife a percentage of disposable retired pay as calculated at the time of the decree. Wife's share in husband's pension was finally determined on the date of the decree as to amounts which had not at that time been waived and, thus, the decree did not violate Mansell by distributing waived amounts. The trial court finally determined wife's interest in this marital asset.

In re Marriage of Strassner, 895 S.W.2d 614,

618 (Mo. App. 1995). Just as the divorce decree in Strassner "protected wife's right to receive the property she had been allocated, or its value, without specifying an improper source of funds for indemnification," the trial court's April 1996 order in this case "did not prospectively divide [waived] benefits, but instead provided a manner of enforcing the property division contained in the original decree." Id.

We also note that the Supreme Court emphasized in Mansell that "domestic relations are preeminently matters of state law," and there is no federal preemption absent evidence that it is "'positively required by direct enactment.'" 490 U.S. at 587, 109 S. Ct. at 2028, quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S. Ct. 802, 808, 59 L. Ed. 2d 1 (1979) (quoting Wetmore v. Markow, 196 U.S. 68, 77, 25 S. Ct. 172, 176, 49 L. Ed. 390 (1904)). Mansell presented "one of those rare instances where

Congress has directly and specifically legislated in the area of domestic relations." Id. Unlike this case, however, the divorce decree in Mansell awarded the wife a community property interest in the portion of retirement pay the husband already had waived to receive disability benefits and thus directly conflicted with the requirements of 10 U.S.C. §§1408(a)(4)(B) and 1408(c). Id. at 585-86, 109 S. Ct. at 2027.

Husband's reliance on Gallegos v. Gallegos, 788 S.W.2d 158 (Tex. App. 1990), is similarly misplaced. On appeal from a final decree, the court held, inter alia, that the trial court "was without authority to divide that portion of [husband's] retirement pay that was reduced in order for him to receive the full pay of his Civil Service position." Id. at 161. Gallegos is distinguishable because the trial court's decree in that case "improperly included and divided property not subject to division as part of the

community estate." Id. In contrast, the trial court in this case did not divide a portion of retirement pay that had been waived due to civil service employment at the time of the decree.

The Tennessee court of appeals has aptly noted that "this type of post-decretal action by military retirees has caused problems for courts and litigants across the nation in divorce cases where a percentage of military retirement benefits has been distributed as marital property." Gilliland, ___S.E.2d at ___, 1997 WL 180587, at *4 (also observing that, in such cases, "the military retiree unilaterally alters the equitable distribution scheme fashioned by the trial court and, in some cases, by the parties themselves"). Mansell suggests that Congress has expressly preempted state courts' authority to divide retirement pay that has been waived pursuant to the dual compensation offset at the time of the decree.

Nonetheless, absent any indication that it is "positively required by direct enactment," we decline to require courts to disturb property allocations in final divorce decrees when a former spouse/military retiree obtains civil service employment after the decree has been entered.[3] Accordingly, we affirm the trial court's orders of April 24, 1996 and following. In our discretion, we decline wife's request for an award of attorney's fees incurred in the trial court proceedings and on appeal.

-signed-
JOHN PELANDER,
Presiding Judge

CONCURRING:

-signed-
PHILLIP G. ESPINOSA, Judge

-signed-
JOSEPH W. HOWARD, Judge

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[3]We recognize that courts in some cases not cited by the parties have reached a contrary conclusion. See Moon v. Moon, S.W.2d 511 (Mo. App. 1990); Knoop v. Knoop, 542 N.W. 2d 114 (N.D. 1996).

FILED
Sep 10, 97

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

September 10, 1997

RE: GADDIS v. GADDIS
2 CA-CV 96-0315

Pima County Superior Court Cause No. D-093699

The following action was taken by the Court of Appeals for the State of Arizona, Division Two, Department B on September 10, 1997.

ORDER: Motion for Reconsideration is DENIED.

Presiding Judge Pelander, Judge Espinosa and Judge Howard participated in the determination of this matter.

JOYCE A. GOLDSMITH, Clerk

APPENDIX C

SUPREME COURT
STATE OF ARIZONA

May 21, 1998

RE: SHARON H. GADDIS vs. EUGENE H. GADDIS
Supreme Court No. CV-97-0452-PR
Court of Appeals No. 2 CA-CV 96-0315
Pima County No. D-93699

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 21, 1998, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees (Appellant E. Gaddis, Pro Se) = DENIED.

Record returned to Court of Appeals, Division Two, Tucson, this 21st day of May, 1998.

NOEL K. DESSAINT, Clerk

TO:

Cynthia L. Anson, Esq., Law Offices of Cynthia L. Anson

Eugene H. Gaddis

Joyce Goldsmith, Clerk, Court of Appeals, Division Two, Tucson

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CERTIFICATE OF SERVICE

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

Eugene H. Gaddis, Petitioner

v.

Sharon H. Gaddis, Respondent

CERTIFICATE OF SERVICE

I, Eugene H. Gaddis, Petitioner Pro Se, hereby certify that on the 17th day of June, 1998, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Cynthia L. Anson, 14 East 2nd Street, Tucson, AZ 85705, counsel for the Respondent herein. I further certify that all parties required to be served have been served.

EUGENE H. GADDIS
Pro Se

7361 E. Victoria Dr.
Tucson, AZ 85730
(520) 745-9475